

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

*Bill Jones*  
DEPUTY ATTORNEY GENERAL  
OFFICE OF THE ATTORNEY GENERAL

In re: ) 1998 OAL Determination No. 2  
Request for Regulatory )  
Determination filed by ) [Docket No. 90-047]  
RONALD KNUTSON regarding )  
a 8/27/90 memo issued by the ) May 8, 1998  
PRISON INDUSTRY )  
AUTHORITY, CALIFORNIA ) Determination Pursuant to  
CORRECTIONAL INSTITUTION ) Government Code Section  
AT TEHACHAPI, entitled ) 11340.5; Title 1, California  
"Designated Smoking Areas" ) Code of Regulations,  
for inmates<sup>1</sup> ) Chapter 1, Article 3  
\_\_\_\_\_)

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney  
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether an inmate smoking policy, issued by the Prison Industry Authority, California Correctional Institution at Tehachapi, is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the challenged policy is not a "regulation" and thus need not be adopted in compliance with the APA.

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## ISSUE

Ronald Knutson, an inmate at California Correctional Institution at Tehachapi ("CCIT"), has submitted a request asking OAL to determine whether an inmate smoking policy (contained in a CCIT memo dated 8/27/90 entitled "Designated Smoking Areas") is a "regulation" required to be adopted pursuant to the APA.<sup>2</sup>

## ANALYSIS

### **I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?**

Penal Code section 5058, subdivision (a) declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]. . . .* [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.<sup>3</sup> After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements (subdivisions (c) and (d)). The applicability of these exemptions will be discussed below.

### **II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application *or* the amendment, supplement or revision of any such rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule *has* been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,<sup>4</sup> the California Court of Appeal upheld OAL's two-part test<sup>5</sup> as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"<sup>6</sup>

**A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"**

**Challenged Rule**

The memorandum was issued by "Prison Industry Authority, California Correctional Institution, Tehachapi, CA 93561." It was signed by various factory superintendents in "IV-A" and "IV-B."

The memorandum designates areas where inmates can smoke (e.g., near the control booth). It also restricts smoking to lunch and break periods.

**Standard of General Application--Rules Applying to Prisoners**

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>7</sup>

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between (1) statewide rules and (2) rules applying solely to one prison.<sup>8</sup> In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),<sup>9</sup> a case which overturned a trial court order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are *distinguished from the institutional rules* enacted by each warden of the particular institution affected." [Emphasis added.]<sup>10</sup>

*Procunier* is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "promulgated *by the Director*" (emphasis added), were subject to APA requirements.<sup>11</sup> The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden . . . ."

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

(1) *Rules* issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public ."  
[Emphasis added.]

This statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

### **The challenged rule does not apply statewide**

By its own terms, the memo applies solely to CCIT. The memo comes from "Prison Industry Authority[,] California Correctional Institution, Tehachapi, CA 93561" and is addressed to PIA staff, presumably at Tehachapi. The designated smoking areas are specific locations at Tehachapi, such as "Silk Screen, the area just outside the Sgt. Control Booth where the two benches are provided."

On February 26, 1997, the Department of Corrections ("Department") submitted a

response to this request. The response "generally denies each and every conclusion and opinion stated in the requester's 'Request for Determination.'"<sup>12</sup> The Department maintains that the "memorandum was addressed to the PIA staff at the correctional institution at Tehachapi only; not to PIA staff at all institutions/facilities. . . ." <sup>13</sup> CCIT's memorandum, the Department argues, falls under the heading of "'local rules' as they address the unique needs of that particular institution/facility."<sup>14</sup>

The requester suggests that the memorandum should be deemed subject to the APA because it concerns "rights of statewide application" such as possible loss of privileges. We agree that loss of privileges is a substantive matter, and is in a sense a matter of general or statewide interest, but conclude that this is not sufficient to render the smoking policy subject to the APA. However different elements of the policy are characterized, it is nonetheless a policy that applies solely to the prison at Tehachapi.

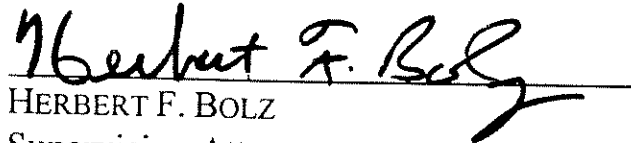
We, therefore, conclude that the challenged rule is not a "regulation" within the meaning of the APA because it is not a rule or standard of *general* application, that is, it does not apply to inmates statewide. It is a "local" rule applying solely to one particular prison. Since the challenged rule does not meet the first part of the two-part test, it is not necessary to address the second part of the test.

Focusing on the period of time following the 1995 amendment of Penal Code section 5058, we conclude additionally that the challenged rule is not subject to the APA because it falls within an express statutory exemption, Penal Code section 5058, subdivision (c)(1).

## CONCLUSION

For the reasons set forth above, OAL finds that CCIT's smoking policy is not a "regulation" within the meaning of the APA, and thus does not violate Government Code Section 11340.5.

DATE: May 8, 1998

  
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## ENDNOTES

1. This Request for Determination was filed by Ronald Knutson, C-04763, 4/B-110, P.O. Box 1902, 4/A, Tehachapi, CA 93581. The agency's response was submitted by Gregory W. Harding, Chief Deputy Director, Support Services, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001.

2. According to Government Code section 11370:

*"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act."* [Emphasis added.]

*We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.*

3. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see 1992 OAL Determination No. 2 (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
4. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) \_\_\_ Cal.App.4th \_\_\_, 67 Cal.Rptr. 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) \_\_\_ Cal.App.4th \_\_\_, 67 Cal.Rptr. 2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

*Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American*



*Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

6. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
7. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
8. See *In re Allison* (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections *and* of the particular institution. . . .") (Emphasis added.)
9. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
10. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
11. The dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132, 1135. The *Hillery* court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to *devise particular rules* applicable solely to those institutions. Nor does

it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue were (1) adopted by the Director of the Department of Corrections and (2) are of *general* applicability." (Emphasis added.) (720 F.2d at 1135, n. 2.)

12. Agency Response, p. 1.
13. Id., at p. 1. Finally, the Department states that, since this request was filed, regulations limiting smoking have been adopted pursuant to the APA (Title 15, California Code of Regulations, section 3188(b)), and that the request is moot.
14. Id., at p. 1.